ISMAIL HJ YUNUS & 2 ORS.
(FOR THEMSELVES AND ON BEHALF OF 300 ORS.)

v.

SYARIKAT KERJASAMA PERKEMBANGAN TANAH PAGAGAU BERHAD & ANOR.

HIGH COURT SABAH AND SARAWAK, TAWAU
TUAN IAN H.C. CHIN J.
[SUIT NO.T-(22)32 OF 1994]
29 AUGUST 1994

INJUNCTION : Plaintiffs seeking injunction to remove defendants from land occupied by plaintiffs - Plaintiffs claiming customary rights over the land - Whether plaintiffs had raised an arguable case - Whether balance of convenience in favour of plaintiffs - Defendants expanded vast sums of money in development of the land - Whether balance of convenience in favour of defendants - Whether mandatory injunction sought by plaintiffs should be granted.

PRACTICE & PROCEDURE : Defendants applying to strike out writ and statement of claim - Application of O. 18 r. 19(1)(a)(b) and (d) of the Rules of the High Court 1980.

The plaintiffs claimed to be the customary right owners of 5000 acres of land at KM28, Pegagau, Semporna. The plaintiffs alleged that the first defendant was appointed to manage the plaintiffs' cultivation of oil palm and other cash crops on the said land, which appointment has since been withdrawn. The plaintiffs sought a mandatory injunction to remove the defendants from the said land and to restrain them from carrying out any work on the said land.

The defendants contended that, as the first defendant was the registered owner of the said 5000 acres of land and the second defendant was on the land with the permission of the first defendant, the plaintiffs had no cause of action and sought to strike out the plaintiffs writ and statement of claim under O. 18 r. 19(1)(a),(b) and (d) of the Rules of the High Court 1980.

Held:

[1] The plaintiffs had hung their case on the various letters approving the 5,000 acres of land to a co-operative called Pegagau Anak Negeri and the fact that their application to register a co-operative under that name had not been approved. The documents produced by the defendants show that the first defendant had in fact used the name Pegagau Anak Negeri Co-operative before the use of its present name and therefore the approval of the land to the co-operative Pegagau Anak Negeri was in fact an approval to the first defendant. In the circumstances there were no serious issues for trial.

[2] The plaintiffs had offered nothing to counter the assertions of the various government departments which tend to show the frivolity of the claim of the plaintiffs. The authorities concerned had confirmed over and over that the land had been approved to the first defendant which fact the plaintiffs adamantly refused to acknowledge. The failure of the plaintiffs to produce the letters from the authorities concerned, which were very material to the matters at hand, was another reason for declining the injunction.

[3] The first defendant had already embarked on development of the land and had expanded vast sums of money which effort would be laid to waste if the injunction were granted. In the circumstances, the balance of convenience favours the first defendant

which is another reason for the refusal of the injunction. In any event, if the land really belongs to the plaintiffs, they will stand to benefit by the development of the land that is now going on over their objection.

[4] The plaintiffs claim for a declaration that they are entitled to native customary rights over the 5,000 acres of land was misconceived and unsustainable. If the plaintiffs want to claim native customary rights, they must apply to the Assistant Collector of Land Revenue and not to the Court which has been excluded by the Land Ordinance from exercising original jurisdiction.

[5] Assuming for the moment that the plaintiffs could establish native customary rights, the Collector of Land Revenue still has the discretion to pay them monetary compensation instead of issuing them titles to the land. Therefore the Collector can still lawfully decide, which he had done in this case, to alienate the land to the first defendant even if the plaintiffs are native customary right owners.

[6] The first defendant has clearly shown that they have been exercising rights over the land since 1965 which the plaintiffs Ismail and Geddik had over a period acknowledged by taking the benefit derived from the agreement for the sale of timber extracted from the land and which agreement was signed by the plaintiff Ismail as secretary of the first defendant. The plaintiffs never complained all these years that their native customary rights had been infringed and never made any claim to the Assistant Collector of Land Revenue for such rights. In the circumstances the plaintiffs claim was wholly unpalatable.

[7] As for the question of trespass by the second defendant, the documents clearly establish that the first defendant had been approved the land and they had invited the second defendant to be upon the land. This was a plain and obvious case for striking out and the writ and statement of claim ought, consequently to be struck out. However as the defendants had not marked the exhibits produced in the manner they should be marked, with the result that a lot of the Court's time was wasted in trying to locate the exhibits and in naming them, the defendants would only be entitled to 80% of their costs.

[Plaintiff's application for injunction dismissed with costs. Defendants application to strike out writ and statement of claim allowed with 80% costs].

Cases referred to:
Burhan bin Ating & 416 Ors. v. Director of Lands and Surveys & 2 Ors. [1992] 2 CLJ 1203. ***(refd)***
Tan Keh Ho v. Telipok Lumber Industries Sdn. Bhd. & 4 Ors [1994] 2 CLJ 294 ***(refd)***

Legislation referred to:
Rules of the High Court, 1980, O. 18, r. 19(1)(a), (b), (d)
Co-operative Societies Ordinance of Sabah, 1958
Sabah Land Ordinance (cap. 68), ss. 4, 9, 15, 16, 41, 88, 89

For the plaintiffs - Basalie Hj. Abdul. Hamid; M/s.Basalie & Co.
For the defendants - Connie Willie; M/s.Skinner Lind Willie Wong & Chin

JUDGMENT

Ian H.C. Chin J:
The writ herein was taken out on 21 July 1994 by Ismail Hj Yunus ("Ismail"), Geddik bin Mohd Saman @ Ibnu Hassan ("Geddik") and Arsad Kibtiani (Imam Lauhari) "(for themselves and on behalf of 300 others who are cultivating in the area of 5000 acres at Pegagau, District of Semporna)" ("the plaintiffs") against Syarikat Kerjasama

Perkembangan Tanah Pagagu Berhad ("the 1st defendants") and Sim Lim Wong Development Sdn Bhd. ('the 2nd defendants'). The present applications, dealt with together, are (1) one by the plaintiffs for an injunction and (2) the other, by the defendants for the writ and the statements of claim of the plaintiffs to be struck out under O. 18, r.19(1)(a), (b) and (d) of the Rules of the High Court, 1980. I heard arguments on 15 August 1994 and adjourned the hearing to today for delivery of my decision. Since the statement of claim has to be referred to in detail for the purpose of determining the cause of action, the same is reproduced here, *viz:*-

Statement of Claim

1. The plaintiffs with another 300 or so other persons and residents are cultivators each of 15 acres of a total area of 5000 acres by virtue of customary rights at KM28, Pegagau, District of Semporna since the year 1965 and before that and who still reside and cultivate the said area.

2. The plaintiffs together with the other 300 persons have submitted an application to the Jabatan Koperasi to be formed and to be members of co-operative society to be known as the Pegagau Anak Negeri Co-operative and which application has not been approved by the Registrar of Co-operative Societies.

3. The plaintiffs grouping themselves collectively have made application to the Lands and Surveys Department and the Ministry of Agriculture and Fisheries for approval of the 5000 acres into the proposed name of Pegagau Anak Negeri Co-operative whilst still remaining onto their ancestral property which they have been doing so from time immemorial under customary rights.

4. The 1st defendants have been verbally and by conduct appointed by the plaintiffs to manage the plaintiffs crops and cultivations of oil palm and other cash crops.

5. The 1st defendants have made an application to the Lands & Surveys Department over the 5000 acres which the plaintiffs are residing under the customary rights and have attempted to usurp the plaintiff's rights by destroying the crops grown therein with the 2nd defendants machinery and interfered with plaintiffs' rights.

6. The 1st defendants' application of the land has been rejected by the Lands & Surveys Department.

7. The plaintiffs have now revoked the 1st defendants' authority to manage the plaintiffs cultivation of the oil palm and other cash crops.

8. The 1st defendants having consorted with the 2nd defendants as their contractors trespassed onto the plaintiffs' area of 5000 acres and continued to stay thereat and extensively destroy the plaintiffs area and rights.

9. The defendants despite the plaintiffs several demands to them to vacate the area and to stop interfering with their rights have refused and neglected to do so.

Wherefore the plaintiffs claim for:-

(a) An order that they are the rightful owners of the said area of 5000 acres at KM28, Pegagau, District of Semporna, under customary rights;

(b) An order that the 1st defendants to forthwith stop interfering with the plaintiffs rights;

(c) Damages for unlawful trespass and unlawful occupation and continued trespass against the defendants jointly;

(d) A mandatory injunction that the 2nd defendants whether by themselves or their servants/agents or otherwise be moved out of the said area and to stop trespassing the plaintiffs;

(e) An injunction against the defendants whether by themselves their servants/agents or otherwise be restrained until final judgment in this action or further order from carrying out the destruction and damages, or all other kinds of works in the plaintiffs' area;

(f) Other damages for the destruction and damages done to the plaintiffs' crops and properties therein;

(g) Further or other relief;

(h) Costs; and

(i) Interests

It is clear, from the statement of claim, *supra*, that the plaintiffs, of an indeterminate number, are claiming they are customary right owners, each of 15 acres, of the 5000 acres of land at KM28, Pegagau, Semporna, that they have grouped together to apply for the land and to register a co-operative to be called **Pegagau Anak Negeri** and they are alleging that the defendants have trespassed their land by continuing to remain thereon after, to quote, "the plaintiffs have now revoked the 1st defendants' authority to manage the plaintiffs cultivation of the oil palm and other cash crops". In support of the application for the injunction, the three named plaintiffs affirmed an affidavit on 20 July 1994; the relevant paras. are :-

3. That we and the 300 persons had submitted an application to the Jabatan Koperasi for a co-operative society to be called **Pegagau Anak Negeri Co-operative** and our application has not been approved.

4. That we have been filling and cultivating the said 5000 acres by virtue of customary rights and we have resided thereat from time immemorial.

5. That in anticipation of our approval we have collectively applied to the state government in 1966 under ref: no. 01406-B(1)/78 for the cultivation of oil palm to the Ministry of Natural Resources in 19 January 1965 approval of the 5000 acres and at the Lands and Surveys Department who written to the juru ukur daerah identifying the said area. Copies of letters from the residents office, Ministry of Agriculture and Ministry of Natural Resources are enclosed herewith and marked 'A','B' and 'C' respectively.

6. That with the above exhibits and by virtue of the plaintiffs' stay on the said 5000 acres it is now confirmed that we have the *locus standi* to bring an action against the defendants for the reasons to be mentioned herein below.

The date of "19 January 1965" in para. 5 has been corrected to read "19 January 1966" by another affidavit of the plaintiffs. The just quoted paragraph 5 is only notable for its bad grammar and bad syntax resulting in the whole paragraph being incomprehensible. The letters marked "A", "B" and "C" referred in the affidavit will now be referred to. The first is dated the 19 October 1965 from the permanent secretary of the Ministry of Agriculture and Fisheries to the chairman of **Pegagau Anak Negeri Land Development Co-operative Society** (marked as exhibit "C") and it reads:-

Ministry of Agriculture and Fisheries,
Jesselton, Sabah Malaysia

19 October 1965.

The Chairman,
Pegagau Anak Negeri Land Development Cooperative,
Semporna.

Sir,

I am directed to refer to Enche Ismail's interview with the minister on the morning of 18 November, 1965 and to inform you that the minister has no objection to the draft agreement between your co-operative society and Koh Chee Chuan. I attach herewith copy of a development plan which I hope you will find it satisfactory.

I am, Sir,
Your obedient servant,
[Signed]
Permanent Secretary,
Ministry of Agriculture & Fisheries.

This letter merely states approval was given for the said co-operative to enter into an agreement with Koh Chee Chuan. The purpose of producing this letter is not explained. It was just dumped upon the Court without any comment from the plaintiffs as to what the letter was supposed to prove. But, if one reads para. 6 of the affidavit (*supra*), the plaintiffs appear to assert that letter (exhibit "C") was to "confirm" their *locus standi* to bring the present action. As for the letter, there is no mention at all that each of plaintiffs had been offered title for 15 acres under the Land Ordinance (Cap. 68) which would be one of the results if they had successfully established the customary right, the other result being the payment of monetary compensation by the government. I will deal more with this aspect of the law later on. As for the affidavit, the just quoted four paragraphs of the affidavit are all there is in support of the plaintiffs' claim for native customary right and their assertion that they have applied for the land for the co-operative **Pegagau Anak Negeri**. The next letter that was produced is from the permanent secretary of the Ministry of Natural Resources to the director of Lands & Surveys which, though dated "19 January 1965", the parties agreed, should be dated "19 January 1966" (exhibit "A") and it reads :-

Ministry of Natural Resources,
Etc...
19 January 1965.

Director of Lands & Surveys,
Jesselton.

Pegagau Anak Negeri & Sharikat Kerjasama
Perkebunan Anak Negeri Berhad
Land Development Cooperative Societies
Semporna

Your LS 1201/5/2/2 dated the 17 January 1966 refers.

2. The Ministry has approved the alienation of 5,000 acres of lands to each of the above co-operative societies on the terms and conditions as recommended by you, subject to the following -

   (a) N.T.terms should be offered to the cooperative societies

   (b) condition 6 should be deleted, and

   (c) under the lessees covenant, the development plan should be approved either by you or the resident (not by the Minister of Agriculture & Fisheries).

[Signed]
Permanent Secretary
Ministry of Natural Resources.

cc PS/NAF
Resident, Tawau
Conservator of Forests, Sandakan.

a This letter shows the minister concerned had approved 5000 acres of land each to the co-operative **Pegagau Anak Negeri** and **Sharikat Kerjasama Perkebunan Anak Negeri Berhad**. The plaintiffs' connection to this letter or to **Pegagau Anak Negeri** thus far was only through the plaintiff Ismail as was mentioned earlier. This letter shows beyond any doubt that the land had already been approved to two co-operative societies, one of which was called **Pegagau Anak Negeri**. Contrary to the assertion of
b the plaintiffs, this letter does not confer upon the plaintiffs any right to the land. In fact, a co-operative called **Pegagau Anak Negeri** has been confirmed to be the successful applicant for the land and thus, again, refutes the claim that the plaintiffs were individually entitled to the land. The next document that was produced by the plaintiffs is a letter from the resident of Tawau to the said two co-operatives dated 1 February 1966 (exhibit "B") and it formally relayed the approval of 5,000 acres of land to, *inter alia*, the
c co-operative **Pegagau Anak Negeri.** This letter reads :-

Resident's Office
Tawau
Date 1 February 1966.

d Chairman
Pegagau Anak Negeri Co-operative,
Semporna.

Chairman,
Anak Negeri Semporna Co-operative
Land Development Society Ltd,
Semporna.

e Your application for a co-operative of 5,000 acres is approved on the following terms and conditions:-

(a) Term - 99 years

(b) Premium - $10.00 per acre.

(c) Annual Rent - C.L. terms ie: RM1.00 per acre for first six years.

f RM4.00 per acre next 4 year

RM6.00 acre thereafter

(d) Instead of the above you may opt for native title terms ie:-

Premium	-	Nil
Rent	-	Nil for 6 years and thereafter 50 cents per acre.

g

(e) **Express Conditions:**

(i) The land is alienated for the cultivation of oil palm or such other crops as may be approved by the director of agriculture and only planting material approved by the director of agriculture may be used.

h (ii) The methods of cultivation used shall comply with all or any directions of the director of agriculture which may from time to time be given by him.

(iii) The land shall be brought into cultivation in 5 stages as follows:-

Stage	Area	Max. No. of Years for development
1	1000 acres	2 years
i 2	1000 acres	2 years

3	1000 acres	2 years
4	1000 acres	2 years
5	1000 acres	2 years

(iv) No occupation of the 2nd and subsequent stages for the purpose of extraction of timber will be permitted until the agricultural development of the immediately preceding stage has progressed to the satisfaction of the resident, Tawau.

(v) Contracts for the extraction of timber and for the development of the land shall require [the photocopying did not reproduce the continuing sentence nor paragraph (vi)]

(vii) The lessees will be required to engage a private surveyor to demacrate the land.

Lessee's Covenant

The lessee convenant that he will within 6 months from the date of acceptance of the terms of the lease prepare and submit for the approval of the resident, Tawau a development plan showing proposals for the agricultural development of the land in accordance with the express conditions of the lease.

Please inform me as soon as possible whether you accept these terms and whether you require N.T. or P.L. terms.

[Signed]
Resident Tawau

HG/GC.

c.c. Circle Forest Officer, Tawau.
District Surveyor, Tawau.
Agricultural Officer, Tawau.
District Officer, Semporna.

This letter serves to again confirm the fact that the land had been approved to the co-operative **Pegagau Anak Negeri.** All the letters, *supra*, show that the co-operative which the plaintiffs claimed to have organised was already approved the land in 1966 but the plaintiffs never explain what they did to the land and what steps they took regarding their application to register the co-operative **Pegagau Anak Negeri** after the approval of the land to their proposed co-operative **Pegagau Anak Negeri**. Thus far, there is no document to support the claim by the plaintiffs in their individual capacity to the 5,000 acres of land. The last letter produced by the plaintiffs, in Bahasa Malaysia (exhibit "D"), is of a very recent origin, *viz*:-

24 September 1993.

Pengarah Tanah dan Ukur,
Karung Berkunci 2044,
8**8576 Kota Kinabalu**

(UP: Encik Osman Hj. Jamal)

Tuan,

Permohonan Tanah Bil. 92120044 oleh
Syarikat Kerjasama Perkembangan Tanah
Pegagau Berhad Seluas 2023.5 Hektar
(5000 ekar) di Pegagau, Semporna

Surat tuan Bil. L.S. 1201.5.2/259 bertarikh 28 Julai 1993 berhubung dengan perkara di atas adalah dirujuk.

Bersama-sama ini dikemukakan Borang LSF.1001 untuk PT. 92120044 dalam 4 salinan sebagaimana yang tuan kehendaki melalui surat tuan LS.1201.5.2/205 bertarikh 11 Oktober 1991.

Pejabat ini ingin memaklumkan bahawa dalam beberapa bulan yang lepas banyak bantahan yang diterima oleh pejabat ini daripada ahli-ahli sama ada secara lisan mahupun bertulis meminta bahagian mereka dikeluarkan daripada Syarikat berkenaan untuk dijadikan kawasan pekebun-pekebun kecil. Perkara ini telah juga dibawa ke pengetahuan YAB Ketua Menteri Sabah . Oleh itu, pejabat ini mencadangkan supaya permohonan PT.92120044 ditangguhkan untuk sementara waktu sehingga ada penyelesaian diterima daripada pihak-pihak tertentu.

Sekian dan harap maklum.

Berkhidmat Untuk Negara dengan Bersih, Cekap dan Amanah

Saya yang menurut perintah,

[Signed]

(Abdul Wahab Datuk Pg. Hj. Abdullah)
Penolong Pemungut Hasil Tanah
Semporna

s.k: - Setiausaha Hasil Bumi,
Jabatan Ketua Menteri,
Kota Kinabalu

This letter, from the Assistant Collector of Land Revenue, Semporna, to the Director of Lands & Survey, while forwarding the 1st defendants' application for the 5,000 acres of land by the 1st defendants, alleges that written and oral objections had been received by the said Assistant Collector of Land Revenue against the issue of title from members of the 1st defendants co-operative and these members wanted the land to be apportioned to them. The letter ended with a suggestion that the application for the land be not entertained for the time being and, no doubt for good measure, the name of the then Chief Minister was mentioned and said to have been informed of the matter. This letter was produced by the plaintiffs to show that the 1st defendants had applied for the land. Again, the plaintiffs claim for customary rights over the land is not supported by this letter. Therefore, apart from the bare assertion of the plaintiffs, nothing was produced to establish their customary rights over the land. The plaintiffs have also not produced anything to support their claim that the 1st defendants were engaged by them to manage the land. Though it is not very clear, it seems to me that the plaintiffs are claiming native customary rights over the land because their application to register the co-operative **Pegagau Anak Negeri** to own the land was not successful.

In my view, finding out whether the co-operative to which the land had been approved was registered or not will in one aspect determine where the plaintiffs' claim stands. It will be recalled that the plaintiffs are claiming that they had applied for the land under the proposed co-operative **Pegagau Anak Negeri** and that the 1st defendants had also applied for the same land while the 1st defendants were managing the same for the plaintiffs (see paras. 3 and 5 of the statement of claim). It follows from the assertions that the plaintiffs are saying the two names, **Pegagau Anak Negeri** co-operative and **Syarikat Kerjasama Perkembangan Tanah Pegagau Berhad** (the name of the 1st defendants) refer to two different co-operatives. The letters produced by the plaintiffs do not clear the air. So far, only the assertions of the plaintiffs had been referred to. This is the opportune moment to refer to the assertions made on behalf of

the 1st defendants to see if the documents produced by the 1st defendants will clear the dust which the statement of claim and the plaintiffs' affidavit had kicked up and confounded the Court. On behalf of the 1st defendants, its chairman, Hj. Abdul Razak bin Hj Palah, deposed two almost identical affidavits on 2 August 1994 and made various assertions with supporting documents in opposition to the application for an injunction and in support of their application for striking out. The assertions of the 1st defendants, gleaned from the said affidavits of Hj. Abdul Razak bin Hj Palah and the documents produced therewith, are as follows.

A group of 26 people led by a Datu Seribu had applied to register a co-operative to be called originally "**Native Co-operative Land Development Society**" which they later proposed to change to "**Sharikat Pertanian Anak Negeri Semporna**". This can be gathered from the letter from the Registrar of Co-operatives dated 28 June 1965 to the said Datu Seribu (exhibit "HAR-2") who, after referring to the said proposed name change, suggested the use of the name "**Pegagau Co-operative Land Development Society**" or, the Bahasa Malaysia version, "**Sharikat Kerjasama Perkembangan Tanah Pagagau Berhad**". Subsequently, on 12 July 1965 the 1st defendants co-operative was registered under the Co-operative Societies Ordinance No. 3 of 1958 of Sabah under the name of "**Pagagau Co-operative Land Development Society Ltd**" or "**Sharikat Kerjasama Perkembangan Tanah Pagagau Berhad**", which were respectively the English and Malay names suggested for the co-operative by the Registrar of Co-operatives in the letter dated 28 June 1965, and a certificate of registration (exhibit "HAR-1") was issued. The number of members as at 12 August 1965 appears to be 339 and a list of the names of these members were made up by the office of Co-operative Development Department (see exhibit "HAR-6"). Thereafter, on 27 August 1965, the 1st defendants entered into an agreement with a Koh Chee Chuan for the sale of timber to be extracted from the land. The parts of this agreement that need detain our attention are:-

> This agreement made 27 August, one thousand nine hundred and sixty-five (1965) between the Sharikat Kerjasama Perkembangan Tanah Pagagau Berhad (formerly known as Sharikat Pertanian Anak Negeri, Semporna) represented by
>
> (a) Datu Saribu - Chairman
>
> (b) Ismail bin Yunus - Secretary
>
> (c) Haji Mohd. Salleh - Committee Member,
>
> of Semporna, Sabah (hereinafter called "the principal" which expression shall where the context so admits include their successors and assigns) of the one part and Koh Chee Chuan of Semporna, Sabah (hereinafter called "the agent" which expression shall where the context so admits include his successors and assigns) of the other part.
>
> In pursuance of the minutes of the general meeting held on 21 August 1965 (a copy of the minutes is hereto attached and marked "A") and the minutes of the committee meeting of the Sharikat held on 22 August, 1965 (a copy of which is also attached hereto and marked "B") whereby it was resolved that Mr. Koh Chee Chuan of Semporna (i.e. the "agent") be appointed sole agent for the sale of the logs "hasil kayu balak Sharikat" extracted from the area allotted to the Sharikat.
>
> Whereas the principal is a registered co-operative society in Semporna (*vide* Registration No. 161/65 dated 12 July, 1965) having been granted land for co-operative land development in the mukim of Semporna, the are of which is 5,000 acres, situate along Pagagau road from mile 8 to mile 14 (*vide* a copy of the letter from the District Officer, Semporna ref: DOS. 25/08/1/151 dated 8 June 1965 hereto attached).

What this agreement reveals is that the plaintiff Ismail was a secretary of the 1st defendants and a signatory of this agreement. Surely, the plaintiff Ismail had by acting as secretary for the 1st defendants and in signing the agreement in such capacity must be taken to have acknowledged the 1st defendants to be the entity that had rights to the land, including the right to dispose of timber extracted from the land. I cannot see how he can now turn around to say that the 1st defendants is not the successful applicant of the land. Apart from that, it will be seen later that the plaintiffs Ismail and Geddik had both benefited from this agreement. The 1 defendants next assert that the plaintiffs Ismail and Geddik had as long ago as 1969 featured in all sorts of disputes relating to the affairs of the 1st defendants and that these had been well documented in, *inter alia*, a letter from the Co-operative Development Department to the Resident of Tawau dated 5 November 1969 ("HAR-7"). Since this letter is illuminating and, in my opinion, may even supply the reason for the plaintiffs' present action, I will set out the letter in full, *viz*:-

> Tuan Resident, 5 November 1969.
>
> Tawau.
>
> **Sharikat Kerjasama Perkembangan Tanah Pegagau Semporna.**
>
> I am directed to inform you that this office has on several occassions been approached by officials of the above society for advice to settle their endless disputes pertaining to the running of their society's land scheme. Their problem seems to be unsolved, though not much of it is of cooperative issue but of management of their present land scheme which it does not seem to satisfy any of the Blocks.
>
> You are, if I may presume, still aware of the problem pertaining to the distribution of land which in due course would be alloted to members who are 334 in number. At the moment these members are divided into three separate Blocks of A with 33 registered and approved members. B with 223 and C with 86. There is at the moment dissatisfaction especially arising from Block B due to the fact that the acreage of land alloted to it is only 2,000 acres for 223 members, whereas Block A with 1,500 acres for its only 35 members, while Block C with 1,500 acres for 86 members.
>
> At the moment the situation is becoming more serious as the result of Block A recruiting additional members from outside the society's registered and approved members to join the group, and that the activities are much contrary to the affairs of a co-operative society, whereas it would fair if such additional members be recruited from Block B which already has excessive members. As it has been made to understand that in accordance with land distribution for cooperative land scheme, each member would be only entitled to 15 acres, then it is fair that Block A should enlist its additional members from Block B in order to make up the number to suit the acreage so alloted.
>
> Each block has its sub-committee which should be under the direction of the main committee of the society. Block A retains the leadership of Inche Ismail Yunus who is not a member, Block B is under Datu Saribu who is also the chairman of the society while block C is under K.K.Gidek who is also not a member. The idea of allowing the society to separate into three blocks was for the purpose of easy management as the result of gruesome arising at its earlier stage. It was also thought by so doing it would give these ketua a change of attitude towards the society as well as a chance to administer these blocks satisfactorily under the guidance of a sub-committees which are under the direction of the main committee. As it appears now Block A does not seem to adhere to the main Committee but rather would run on its own. This is entirely wrong and contrary to the principle that a co-operative society should practice.

Much of the problem that is being faced is due to the presence of the two ketua of Block A and C who are non-members and the refusal of Block A to enlist its additional members to the group from Block B. What appears to be more discontent is that Block A has taken its labour force to work in the area from outsiders thereby depriving other legitimate members to work in their scheme. Such attitude of the ketua is detrimental to the interest of the society. The office views with concern over the whole affair and would not welcome any interferences from persons who have no jurisdiction over it unless so justified of their services. However, as it was thought it would be to the interest of the society that these non-member ketua could be retained for their services, their presence were only as advisers and nothing beyond that, and they would not have discretion over the affairs of any part of the society. But up-to-date such step has proved unworthy and innocent members have found it not possible to evict them out of the society in mutual and understanding manner and their presence has caused confusion after another over the whole issue.

In the light of the above, and in consideration that the whole matter has bearing over the land issue, therefore this office would be much obliged if you could advise this society on the policy of land distribution in respect of co-operative members in co-operative land schemes. We have, on consultation with the setiausaha tetap, Kementerian Pertanian dan Perikanan, agreed that this society must adhere to the decision that the division of land should confine to the registered members only.

[Signed]
b.p. Timbalan Pesurohjaya Kemajuan Kerjasama,
Kota Kinabalu.

Etc....

For the first time, a link of the plaintiff Geddik to the matter herein is established by this letter in that his name is mentioned as being the leader of the group of members who were grouped under Block C of the land of the co-operative. This letter also serves to establish that the plaintiff Ismail was the leader of the members grouped under Block A while Datu Seribu, the then chairman and now the deputy chairman of the 1st defendants, to be the leader of the members grouped under Block B. According to this letter, the three groups had unequal number of members and each group had been alloted disproportionate acreage of lands with the result that members of one block will get much more land than the members of other groups; hence the squabble which existed as far back as 1969. Also significant is that this letter shows that the 1st defendants were supposed to manage the land scheme but was unsuccessful on account of the feud between the plaintiffs Ismail and Geddik and the said Datu Seribu which resulted in the fragmentation of the management of the land. This letter, in my opinion, serves again to confirm the land being approved to the 1st defendants. The squabble led to a discussion on 30 December 1969 between certain committee members of the 1st defendants and officers of various government departments. Though it was supposed to be a discussion, as the heading of the minutes (attached to exhibit "HAR-8") suggest, resolutions were passed and one of which was that the three blocks, block A, B and C should cease to exist and that the 1st defendants should operate as one body only. As a result of this meeting, the resident on 21 January 1970 wrote to the permanent secretary of the Ministry of Agriculture and Fisheries in these terms (exhibit "HAR-9"):-

Sharikat Kerjasama Kemajuan Tanah Pagagau

Ref. MAF. 103/75/212

I have to refer to the report of the Timbalan Persuruhjaya Kemajuan Kerjasama Coop. No. 500/161/65/B/109 dated 8 January 1970 on the meeting held on 30 December 1969 between committee members and to inform that the statements therein are correct.

a In order to put matters straight and in order to avoid trouble in future, I consider that a directive based on the recommendations made at item 8 of the report should issue from your Ministry:-

(a) That Enche Ismail bin Yunus and K.K. Giddek are not eligible member of the co-operative based on the letter from the Registrar of Coop in 1967. Item 8(2) of the report is relevant. They would however still be responsible and answerable for the
b funds paid to them from 1 January, 1968 to November 1969 - Ismail RM297,500, Giddek RM334,000 (break down of these accounts will be given later).

(b) The three blocks of A, B, & C should cease to exist or function separately and should be merged into one so that the society shall operate as one body only.

(c) The 1,646 acres logged by one contractor and all the proceeds to be paid into the bank account of the society, release of funds for expenses will only be permitted on the
c recommendation of the Agricultural Officer and the cheque should be countersigned by the Co-operative Officer, Semporna.

(d) Finalisation of the survey plans of the 5,000 acres with Messrs Steen Scheated & Partners so that the titles can be prepared.

(e) No new members should be allowed to be taken into the society. Only those whose
d names appear on the list A, B, & C are entitled to the land as members of the society.

(f) A proper and detailed audit check of the societies accounts from the beginning when the proceeds were paid into one bank account and later when the societies land were divided into 3 block and accounts were also separated (which has continued right up to end of December, 1969) should be carried out as soon as possible.

(g) Annual general meeting of the society should be convened as soon as possible in order
e to appoint chairman, vice chairman, secretary, treasurer, committee members as this appear to have been haphazardly done before.

I have obtained from the Cooperative Officer Semporna list of members of society of blocks A, B and C under the leadership of Enche Ismail bin Yunus, Datu Seribu and K.K. Giddek respectively. I forward herewith a copy for your information and retention.

f I have also obtained a list of payment of monies made by the contractor Koh Chee Chuan to the three respective heads i.e. Enche Ismail bin Yunus - Block A, Datu Saribu - Block B, & K.K. Giddek - Block C, from 1 January 1968 to November 1969. Totals of which each has received are as follows:-

Ismail b. Yunus
Block A. RM297,500

g **Datu Saribu**
Block B RM480,425.15

K.K. Giddek
Block C RM334,000.00

The above are monies paid direct to the leaders and not into any bank account. In addition
h there is the RM80,000 in the bank pass book (which has now only a balance of about RM8,000 as at 30 November 1969) which have to be accounted for. I attach herewith copy of the list of each payments of the contractor Koh Chee Chuan for your information.

The labourers and overseers etc of Block A under Enche Ismail bin Yunus and Block C under Enche K.K. Giddek are requesting for their pay for the months of November and December, 1969. The problem is now being dealt with by Labour Department Tawau. It is therefore now important that the Contractor Koh Chee Chuan pays what timber
i proceeds there is from the approx. 250 acres of the 1,646 acres he has already logged into the societies bank account so that these salaries can be paid.

> Enche Ismail and K.K. Giddek have tried to make trouble when resuming of logging operation was permitted by you recently. I have however warned them of the consequences and the police have been most helpful in keeping them in hand. However this is not the real answer to the problem and I urgently request that immediate action be taken on the recommendation mentioned above. .....

From this letter, quite apart from the question of the allocation of lands to the three groups of the co-operative, there was also the question of the large sums of money which the plaintiff Ismail and Geddik, and the said Datu Seribu, had pocketed and which, according to the letter, should have gone into the account of the 1st defendants. These moneys, according to this letter, came from a Koh Chee Chuan, the person who entered the agreement with the 1st defendants on 27 August 1965 and which I have referred to earlier. I pause to remark that the plaintiffs Ismail and Geddik did not question the right of the 1st defendants over the land, when the 1st defendant entered into the agreement with Koh Chee Chuan, if they were in a position to collect payment. This was actually the case in the early years of the co-operative. Also clear is the fact that the plaintiffs Ismail and Geddik, because they already then owned land, could not be members of the 1st defendants and were in fact not members of the 1st defendant (see the list of membership annexed to exhibit "HAR-6"). The letter suggested that the three blocks of land should be managed as one by the 1st defendants. There is no evidence as to what happened for the following two decades right till the 1st defendants formally on 23 January 1992 applied for the land which application I had earlier adverted to when dealing with the plaintiffs' assertion. The plaintiffs Ismail and Geddik, during the said interval, appeared to have gone into hibernation, waking up only after the 1st defendants on 8 August 1993 entered into a memorandum of understanding with a company called Malaysia Kuwaiti Investment Co. Sdn Bhd for the development of the land into an oil palm plantation and providing for the joint venture to be carried out through a company (exhibit "HAR-13"). In pursuance to this memorandum, a joint venture agreement was entered into on 10 February 1994 (exhibit "HAR-14") the details of which need not detain our attention. Though it is not known since when but by 23 September 1993, as the minutes of an annual general meeting of the 1st defendants show, the plaintiffs Ismail and Geddik were no longer office bearers of the 1st defendants. The plaintiffs thereafter engaged in various exchanges of letter and it is to them that I will refer. I will pause here to remark that none of these letters were revealed by the plaintiffs. The first of these letters was the one dated 5 January 1994 issuing from the Director of Lands & Surveys to the plaintiffs Ismail and Arsad bin Kibtiani and another person (exhibit "HAR-4(a)") and this was in response to their letters dated 29 September, 1993 and 18 October 1993. This letter of 5 January 1994 pointed out to them that the 5,000 acres of land had been applied by and approved to the 1st defendants and not to the individuals and that, therefore, there is no question of dividing the land into blocks. This letter was issued after the Director of Lands & Surveys had, unknown to the plaintiffs, obtained the views of the Registrar of Co-operatives which were conveyed by his letter of 9 December 1993 (exhibit "HAR-4(b)"). The plaintiffs Ismail and Geddik were apparently not happy with the said letter of the Director because they wrote to the Director of Co-operatives on 3 June 1994 as revealed by a reply sent by the Director of Co-operatives to them on 16 June 1994 (exhibit "HAR-10"), the terms of which are :-

Jabatan Pembangunan Koperasi Sabah

Etc,....
Encik Ismail Yunus dan
Haji Geddik Bin Mohd. Saman,
Etc....

16 June 1994

Tuan-Tuan,

Permohonan Tanah Bil: 92120044 seluas 5,00 ekar oleh Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad Di Pagagau Semporna

Adalah saya dengan hormatnya merujuk surat tuan (tanpa rujukan) bertarikh 3 Jun, 1994 iaitu mengenai perkara yang sama di atas.

Sila maklum sekali lagi bahawa tanah seluas 5,000 ekar yang telah diluluskan melalui surat R.T.No. 01406-B(1)/78 bertarikh 1 Februari, 1966 adalah sah atas milik Syarikat Kerjasama Perkembangan Tanah Pagagau Berhad dan bukannya kepada individu.

Kesangsian tuan terhadap nama 'Pegagau Anak Negeri Co-operative Semporna' seperti dalam surat tersebut (R.T.No. 010406-B(1)/78 sepatutnya tidak timbul kerana nama berkenaan juga seperti tuan maklum/tahu adalah nama koperasi ini sebelum ia didaftarkan dengan sah pada 12 Julai 1965 melalui sijil pendaftaran no. 161/65 (disertakan salinan). Sila rujuk lampiran-lampiran yang dilampirkan (lampiran A hingga D) yang mengesahkan kenyataan di atas.

Sila ambil perhatian serius bahawa dengan adanya penjelasan ini pihak tuan dapat menghilangkan kesangsian terhadap kesahihan hak milik tanah koperasi ini.

Sehubungan dengan itu, perkara ini tidak harus ditimbulkan lagi demi kebaikan kepada koperasi dan ahli-ahilnya.

Sekian, terima kasih.

.....

This letter stressed that the 5,000 acres of land belong to the 1st defendants and not to any individual. The letter also explained that the name **Pegagau Anak Negeri Co-operative Semporna** was used by the 1st defendants before its registration under the present name. It was additionally explained through an annexure (exhibit "HAR-11") that the 1st defendants before their registration as P**agagau Co-operative Land Development Society Ltd** had used the other names of **Pegagau Anak Negeri Co-operative Semporna**, the **Native Co-operative Land Development Society** and **Syarikat Pertanian Anak Negeri Semporna**. It also explained that there was another co-operative registered on 12 July 1965 and it was registered as Anak Negeri Semporna Co-operative Land Development Society Ltd but that the registration of this co-operative was cancelled and their members became members of four other co-operatives. Pausing here and returning to the reasons I dismissed the application for an injunction, I would say that the failure of the plaintiffs to disclose the letters which I just referred to and which are very material to the matters at hand is another of the reasons for the Court declining the injunction. Another reason for declining the injunction is that I am of the opinion that there is no serious issue for trial. The plaintiffs, it will be recalled,

had hung their case on the various letters (*supra*) approving the 5,000 acres of land to co-operative **Pegagau Anak Negeri** and that their application to register to co-operative under that name has not been approved. The documents I have referred to show that the 1st defendants had in fact used the name **Pegagau Anak Negeri Co-operative** before the use of its present name and therefore, the approval of the land to the co-operative Pegagau Anak Negeri was in fact an approval to the 1st defendants. The plaintiffs had offered nothing to counter the assertions made by various government departments which tend to show the frivolity of the claim of the plaintiffs. To recap, the plaintiffs had relied on various letters showing the co-operative **Pegagau Anak Negeri** to have been approved the land and upon the strength of those letters argued that the 1st defendants were not the successful applicant of the land because the 1st defendants' name is not co-operative **Pegagau Anak Negeri**. But the 1st defendants had produced uncontroverted documents to show that the 1st defendants had used P**egagau Anak Negeri** as its co-operative name. There is no serious issue for trial.

Mr. Basalie Hj. Abdul Hamid Counsel for the plaintiffs, did not advert to the assertions and documents of the 1st defendants. The plaintiffs had called them an "exercise in semantics consists (sic) of nothing but assumptions and verbosity repetitious (sic) of the same things over and over again". What is repetitious is the confirmation over and over by the authorities concerned that the land had been approved to the 1st defendants which the plaintiffs adamantly refused to acknowledge. The 1st defendants had already embarked on development of the land and had expanded vast sums of money which efforts would be laid to waste if the injunction is granted. Therefore, the balance of convenience favours the 1st defendants which is another reason for the refusal of the injunction. If the lands really belongs to the plaintiffs, they will stand to benefit by the development of the land that is now going on over their objection. For the reasons set out, *supra*, I on 16 August 1994 dismissed the application of the plaintiffs for the injunction with costs. I will now turn to the question of whether the writ ought to be struck out.

I have at the outset set out the statement of claim and the prayers of the plaintiffs, one of which is: "An order that they are the rightful owners of the said area of 5,000 acres at KM28, Pegagau, District of Semporna, under customary rights." The plaintiffs are asking the Court to declare or make an order that an indeterminate number of persons are entitled to customary rights over 5,000 acres of land. Apart from stating generally the place where the 5,000 acres of land is located, no specific delineation was given nor was any plan produced to denote the specific area concerned. The names of the 300 or so people who constitute the plaintiffs are also not given. No matter, because an amendment to the pleading may cure all that. The more important issue is this: Does the Court have the jurisdiction to make an order that the plaintiffs are the native customary right owners of the land ? The Land Ordinance (Cap.68) will have to be adverted to and this the Court had done in *Burhan bin Ating & 416 Ors. v. Director of Lands and Surveys & 2 Ors.* [1992] 2 CLJ 1203. I need only reproduce what was said in that case, at pp.1206-1207, which is relevant, *viz*:-

> ....All claim to native customary rights, which rights are defined in section 15 and 16 of the Land Ordinance and which include lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years, are to be decided, as provided by s. 4 of the Land Ordinance by the Collector of Land Revenue. Even if the claim to native customary rights is established, the Collector still has a discretion, under s. 16 of the Land Ordinance, whether to pay monetary compensation or to issue a title to the claimant.

Anyone dissatisfied with the decision or order of the Collector of Land Revenue can appeal to the Director of Lands & Surveys and from the decision or order of the Director of Lands & Surveys, to the High Court. See s. 41 of the Land Ordinance. The Court is not to exercise original jurisdiction as to any claim or question in respect of which jurisdiction is given by the Land Ordinance to a Collector of Land Revenue or to the Director of Lands & Surveys. See s. 41(2) of the Land Ordinance.

The Land Ordinance, s. 88, read with s. 89, provides that no claim to land shall be valid until the title to the land is registered in accordance with the provisions of part V of the Land Ordinance. A discretion is conferred, by s. 9 of the Land Ordinance, on the Director of Lands and Surveys whether or not to alienate lands to anyone and his decision is by s. 41(1) of the Land Ordinance not appealable.

Clearly, the Land Ordinance prohibits the Court from exercising original jurisdiction over claims to native customary right. It is to be noted that Mr. Basalie was the Counsel appearing in that case for the plaintiffs and the suit there was struck off. That case was a claim against the Director of Lands and Surveys and the government of the State of Sabah and another party. In our case, the said Director and government of the State of Sabah are not even parties to the suit for which an order adverse to them is sought. The claim against the defendants for "an order that they are the rightful owners of the said area of 5000 acres at KM28, Pegagau, District of Semporna, under customary rights" is totally misconceived. If their claims to native customary rights have already been established they must have by now been issued with titles. They have not been issued with titles which means that they have yet to establish their claim. If they want to claim now, they must apply to the assistant collector of Land Revenue and not to the Court which has been excluded by the Land Ordinance from exercising original jurisdiction. Therefore, I am of the view that not only was there no serious issue to be tried, the plaintiffs' claim for the reasons I have adumbrated above is clearly unsustainable. As for the question of trespass, the documents clearly establish that the 1st defendants had been approved the land and they had invited the 2nd defendants to be upon the land. Here again, quite apart from the inability of the plaintiffs to establish their right to the land the 1st defendants had clearly shown that they have a right over the land which the plaintiffs Ismail and Geddik had over a period acknowledged by taking the benefit derived from the agreement for the sale of timber extracted from the land which the 1st defendants entered into with one Koh Chee Chuan and which the plaintiff Ismail signed as secretary of the 1st defendants. In any event, the plaintiffs are pursuing their claim in the wrong forum. Assuming for the moment that they could establish native customary rights, the Collector of Land Revenue still has a discretion to pay them monetary compensation, instead of issuing them titles to the land, which means that the Collector can still lawfully decide, which he had done in this case, to alienate the land to the 1st defendants even if the plaintiffs are native customary right owners.

One other factor makes the plaintiff's case wholly unpalatable. The 1st defendants had, to the knowledge of the plaintiffs, been exercising rights over the land since 1965 including, as was said earlier, extracting and selling timber from the land, yet the plaintiffs never complained all these years that their native customary rights had been infringed. They did not submit any claim to the Assistant Collector of Land Revenue for such rights. Not only that, the plaintiffs Ismail and Geddik had actively participated in the affairs of the 1st defendant during the early years after the incorporation of the 1st defendant and, if I may add, lining their pockets as well as a result thereof.